



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DOCUMENT FOR PUBLIC RELEASE

A protected decision was issued on the date below and was subject to a GAO Protective Order. This version has been redacted or approved by the parties involved for public release.

Matter of: Carlson Wagonlit Travel--Request for Declaration of Entitlement to Costs

File: B-266337.3; B-266338.3; B-266346.3

Date: July 3, 1996

Lars E. Anderson, Esq., J. Scott Hommer III, Esq., and Wm. Craig Dubishar, Esq., Venable, Baetjer and Howard, LLP, for the protester.

Marie N. Adamson, Esq., Michelle Harrell, Esq., and Janet Harney, Esq., General Services Administration, for the agency.

Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In resolving requests for declaration of entitlement to costs following corrective action by contracting agency, the General Accounting Office does not deem 38 working days taken by the agency before taking corrective action to be an undue delay where four separate protests were filed simultaneously against the agency; the protests involved complex and detailed evaluation issues; the agency had to review and organize numerous documents to respond to the protester's document production requests; four separate good faith dismissal requests by the agency had to be resolved; and the agency diligently and quickly responded to all requests by our Office to expedite the discovery and protest process.

DECISION

Carlson Wagonlit Travel requests that our Office declare it entitled to recover the costs of filing and pursuing its protests in connection with three solicitations issued by the General Services Administration (GSA) for commercial travel management services for various agencies.¹

¹Carlson initially protested request for proposals (RFP) Nos. 3FBG-W-CW-N-5197 (White House); 3FBG-W-AO-N-5205 (Department of State); 3FBG-W-CM-N-5204 (Department of Agriculture); and 3FBG-W-CM-N-5201 (National Institutes of Health (NIH)). Contracts under three of these solicitations were awarded to American Express Travel Related Services Company, Inc.; the remaining contract (NIH) was (continued...)

We deny the request.

On September 29, 1995, Carlson filed four protests against awards under four separate but very similar solicitations issued by GSA. The protests substantively shared several major protest grounds. Briefly, Carlson argued that the agency allegedly failed to follow the stated evaluation criteria by unreasonably assigning "enhancement credits" to the awardee while ignoring significant enhancements offered by Carlson's proposal that reflected cost savings for the government;² that the agency failed to evaluate offerors's past performance in accordance with the terms of the solicitation; that the agency failed to conduct adequate discussions with Carlson; and that GSA improperly waived the RFP restriction prohibiting offerors from submitting their proposals in "alternative proposal formats" to the prejudice of Carlson. Concerning enhancements, Carlson's initial protests were based in substantial part on "information and belief."³ Along with its protests, Carlson filed detailed discovery requests for evaluation and other documents with the agency.

The original due date for the agency's reports was November 6. On October 16, the agency notified our Office of its intent to file requests for dismissal, in whole or in part, with respect to each protest filed by Carlson. At that time, our Office notified GSA that in view of the complexity of the protests and the number of documents requested by Carlson, we were requesting GSA to permit counsel for the protester and counsel for the interested parties direct access to GSA's documents, in the hope of expediting the discovery process by eliminating or reducing potential document disputes; we also requested GSA to produce a protest exhibit file prior to its submission of the agency report in order to early identify any supplemental

¹(...continued)

awarded to Ober United. As explained below, we dismissed Carlson's protest against the award of the contract under the NIH solicitation because we found that the firm was not an interested party. See 4 C.F.R. §§ 21.0(a) and 21.1(a) (1995).

²An "enhancement" is a proposed service or benefit offered by an offeror above the minimum requirements of the solicitation.

³For example, Carlson stated that "[h]ere, on information and belief, the GSA's analysis of the 'most advantageous' offer 'to the Government' was flawed [because of a faulty enhancements evaluation]." As another example, Carlson stated that "[o]n information and belief, the Government failed to give proper evaluation credit for numerous significant and meaningful enhancements proposed by Carlson. Carlson also argued that "[o]n information and belief, GSA assigned enhancement credit [to one of the awardees for insignificant parking discounts]."

protests. GSA then requested that our Office, in the interest of limiting document production to issues properly before our Office, issue a ruling on GSA's dismissal requests prior to GSA granting access to counsel to the agency's procurement documents. We granted GSA's request.

On October 20, GSA filed four separate requests for dismissal. On October 27, Carlson filed responses to the dismissal requests. On October 31, GSA filed responses to "inaccuracies" allegedly contained in Carlson's responses to GSA's requests for dismissal. Four working days later, on November 6, our Office issued its ruling on the agency's dismissal requests; in our ruling, we dismissed one protest in its entirety because we found that Carlson was not an interested party, and we partially dismissed one protest ground in each of the three remaining protests.

On November 9, GSA provided counsel for Carlson with the protest exhibit file consisting of 15 volumes of procurement documents; on November 13, GSA permitted counsel for the protester to visit the agency and perform an on-site inspection of all procurement files. From November 14 to November 20, GSA, along with many other federal agencies, was shut down due to a furlough. GSA called and requested our Office not to penalize the agency for the furlough but to grant additional time in view of delays beyond its control. We granted the request. On November 22, Carlson filed three separate detailed supplemental protests based on the documents it received in the protest exhibit file and its on-site inspection of documents. Seven working days later, on December 4, the agency took corrective action (because "the evaluation of enhancements was flawed") by terminating the awards and agreeing to recompet the requirements. On December 11, Carlson filed these requests for declaration of entitlement to costs for the three protests that resulted in corrective action by the agency.

Under the rules applicable to this case, where an agency took corrective action on a protest filed within our Office prior to our issuing a decision on the merits, we may declare a protester entitled to "recover reasonable costs of filing and pursuing the protest." 4 C.F.R. § 21.6(e); Metters Indus., Inc.--Request for Declaration of Entitlement to Costs, B-240391.5, Dec. 12, 1991, 91-2 CPD ¶ 535. This provision was intended to allow the award of costs when agencies unduly delayed taking corrective action in the face of a clearly meritorious protest. *Id.* A protester is not entitled to costs where, under the circumstances of a given case, including the complexity of the procurement or procurements and the issues involved, an agency does not unduly delay taking corrective action. See Locus Sys., Inc.--Request for Declaration of Entitlement to Costs, 71 Comp. Gen. 243 (1992), 92-1 CPD ¶ 177.

Here, from the initial filing date of September 29, the agency took 38 working days (excluding the furlough days) to take corrective action, 13 working days past the initial due date for the agency report. Carlson argues that this delay entitles it to costs, stating that "[i]nstead of assessing the merits of the protest allegations or

filing a responsive agency report, GSA . . . filed four separate and extensive Motions to Dismiss [totaling] 36 single-spaced pages, not including the 17 exhibits [that were attached to the motions]."

The record shows that the agency's dismissal requests did delay the production of documents and the agency report from which the protester could have asserted its supplemental protest grounds at a much earlier date. However, we find that the agency's requests for dismissal of the protests were reasonable, raised procedural matters which were of potentially substantial importance to the resolution of these protests, and were filed in good faith. We think a contracting agency, in defending protests filed with our Office, is permitted to vigorously assert procedural and substantive defenses in good faith without having to risk the assessment of costs. Here, since our Office dismissed one protest in its entirety in response to GSA's request and partially dismissed the three other protests, we find that GSA in good faith asserted reasonable procedural defenses which agency counsel has a right and duty to do. In short, we think the agency's pursuit of a reasonable procedural litigation strategy before our Office does not constitute undue delay.

Moreover, we fail to see how GSA otherwise unduly delayed taking corrective action. First, we note that our Office tasked GSA to produce a voluminous protest exhibit file prior to the submission of the agency report. As GSA states:

"The agreement to extend the original filing date [of the agency report] allowed GAO to rule on the agency's summary dismissal requests as well as to permit the agency to provide the protester and interested parties with copies of protected material prior to the filing of the agency report. By providing the protester and interested party with the protected material, GSA was facilitating the protest process for both GAO and the protester. By releasing the documents prior to the development of the agency report, GSA was necessarily required to devote time and limited resources to document production at the expense of time and resources devoted to review of the merits of the protest."

Second, even though the protest involved complex and detailed evaluation issues, and extensive document production requests, GSA diligently and quickly responded to all requests by our Office to expedite the discovery and protest process. Under the circumstances, Carlson's requests for declaration of entitlement to costs is denied.

Comptroller General
of the United States